

FILED

DEC 05 2008

**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY

IN THE MATTER OF A MEMBER
OF THE STATE BAR OF ARIZONA

No. 07-1259

DAVID E. OLIVER,
Bar No. 104583

HEARING OFFICER'S
FINDINGS AND
RECOMMENDATION

Procedural History

This matter was initiated by a Bar Complaint containing one count, filed on June 26, 2008. Respondent answered pro se on July 21, 2008. On October 24, 2008 Mark Rubin filed his Notice of Appearance as Counsel for Respondent. A Joint Pre-Hearing Statement (the "Statement") containing Stipulated Facts was filed on October 24, 2008. The matter proceeded to a hearing on November 3, 2008.

Findings of Fact

Based on the admissions contained in the answer, the stipulated facts contained in the Statement, and the testimony and evidence presented by Respondent, the sole witness at the hearing; the following pertinent facts are found.

1. At all times material herein the Respondent was an attorney licensed to practice law in the State of Arizona, having been admitted to practice in this State on October 23, 1993.

2. At all times in issue herein Respondent's virtually exclusive legal work was performed as a salaried attorney employed by the Tohono O'odham Advocate

Program, a program funded by that Native American Nation to provide free public defender and civil representation to members of the Nation.

3. In his employment he was not required to nor did he maintain a trust account relating to his tribal clients; nor was he required to keep time records of his legal services provided to these clients.

4. In June of 2007 a Native American acquaintance of Respondent from the Gila Indian Reservation requested his legal services in connection with establishing a partnership with a non-Indian for the purpose of bringing an economic development program to the Gila River Reservation. This was Respondent's only private client.

5. Respondent agreed to provide those services at a \$75.00 per hour rate with a \$500.00 non-refundable retainer.

6. This hourly rate is approximately 1/3 to 1/4 the then current rate in Arizona for legal services for transactional work of the type to be performed.

7. In connection with this Respondent's client paid him the sum of \$2,000.00 which was deposited on June 7, 2008 in an IOLTA Trust at the Bank of America; an account opened solely for this client's case.

8. On June 7, Respondent, at the time of the initial deposit, withdrew a simultaneous debit from that checking account in the amount of \$500.00 to pay himself for legal services previously rendered this client.

9. On June 14, \$66.00 was debited against the account to pay for a check order.

10. Following that the following payments were made from this account to

Respondent:

Undated	Check No. 3001	\$300.00
June 27, 2007	Check No. 3002	\$200.00
July 3, 2007	" " 3003	300.00
July 10, 2007	" " 3004	200.00
July 13, 2007	" " 3005	150.00
July 20, 2007	" " 3006	375.00

11. This resulted in an overdraft of \$91.00, which was paid by the bank.

12. The records of the Bank of America show the account to be in the name of David Oliver, but with an address of: 201 N. Tryon Street, Charlotte NC 28202.*

13. The Respondent corrected the overdraft with a deposit as soon as he learned of its existence.

14. Since the check was payable to Respondent, neither his sole client, nor anyone else could have been affected even if the check had been dishonored.

15. The actual time billed for legal services by Respondent would have shown that at the time of the July 20 check the billings would have justified \$1707.50 in total charges, including the non-refundable \$500.00 retainer.

16. The Respondent testified that his time records did not reflect the actual time spent on this client's legal matters, and that if he had kept accurate records, the time spent was well in excess of the amount he paid to himself from the trust account.

* The records of the State Bar of North Carolina, as found on the internet, reveal 11 attorneys named Oliver; none named David, and none residing in Charlotte.

17. The Respondent did not maintain an individual client ledger for any client funds

because he had only one private client.

18. On August 1, 2007 the State Bar staff requested an explanation of the overdraft by August 21.

19. On August 13 Respondent wrote the State Bar confirming a conversation with Gloria Barr, the Trust Account Examiner for the State Bar, in which he stated that he had a total hip arthroplasty followed by an extended hospital stay, requesting an extension of his response time until September 27, 2007; which request was granted.

20. On October 1, 2007 Ms. Barr wrote Respondent noting that she had not received a response and granting a further extension until October 10.

21. On October 12 2007 Ms. Barr spoke to Respondent on the phone stating that she had not received a response. Respondent stated that he had been forgetful of her requests.

22. On November 5, 2007; having received no response, Ms. Barr wrote Respondent concerning this and requested a reply in 5 days. [Although the stipulated facts state that this letter granted "another five (5) days until November 6, 2007, for Respondent to provide an initial response" (Statement ¶ 9); the letter merely states it is a "request for a response within five (5) days of this letter".]

23. On November 11, 2007 Respondent telephone Ms. Barr and stated that his wife's health condition (post-operative pneumonia following foot surgery) made him her sole care giver at their home. He also noted the fact that the Bank of

America cancelled checks had been sent to the incorrect North Carolina address.

Ms. Barr and he agreed on a new deadline of November 30.

24. On November 30, 2007 Respondent mailed his initial response to the State Bar.

25. On December 7, 2007 Ms. Barr requested additional documentation in 20 days; to which the Respondent did not reply.

26. On January 7, 2008 Ms. Barr sent a repeated request and granted an additional 10 days to January 17, 2008 for a response. Respondent did not reply to this request.

27. On January 28, 2008 Ms. Barr spoke with Respondent. He stated he was out of town on a vacation and a serious family mental health problem and resulting financial crisis involving his sister in Florida.

28. On February 8, 2008 Ms. Barr attempted to call Respondent, but was unable to reach him.

29. On February 29, 2008 Ms. Barr and Respondent traded voice mail messages.

30. On March 4, 2008 Ms. Barr again, by letter, requested a reply by March 14.

31. On March 5, 2008 the state Bar issued its subpoena to the Bank of America, requesting records from the Respondent's IOLTA Trust Account.

32. By letter dated March 28, 2008, the Bank provided the subpoenaed documents.

33. Also on March 28, 2008 Respondent telephoned Ms. Barr to request a meeting to take place on April 4. Ms. Barr was unavailable on that date.

34. On April 3, 2008 Respondent advised Ms. Barr's assistant that he would mail

The documents the next day. He did not do so.

35. On April 16, 2008 a State Bar Staff Investigator telephoned Respondent.

Respondent acknowledged his laxity and stated he hoped to provide a response the next week. He did not do so.

36. On May 2, 2008 Staff Bar Counsel Matt McGregor telephoned Respondent and Provided a "final" deadline of May 16, 2008.

37. On May 14, 2008 Respondent submitted his response to the second request with all documentation.

38. In his response, Respondent stated that he had no explanation for the July 20, 2007 overdraft.

39. In the hearing Respondent stated he simply forgot to check the balance when he wrote the check.

40. Respondent also testified to the fact that he was carrying a civil case load in excess of 85 cases with no case management system.

41. The Tohono O'odham Nation covers an area approximately the size of the State of Connecticut. The Respondent stated that approximately one-third of his clients had no telephone service, requiring him to make extended trips to their homes.

42. He also testified to the fact that he complained to his employers concerning his case load, and eventually was assigned only criminal cases, although he still retained some civil cases.

43. The Respondent stated that he tried to cooperate with the State Bar, and had

established fairly regular communication with Ms. Barr; but that in part his delayed response was attributable to his belief that a very minor booking oversight, which was immediately corrected and which adversely affected no one, was of less moment than his clients' and his family's needs.

45. Respondent has also voluntarily sought Ms. Barr's assistance in maintaining a trust account and took the State Bar Trust Account seminar.

46. There was no evidence of any complaint or dissatisfaction by the private client.

Professional Conduct Violations Charged

The State Bar charges are essentially twofold. With respect to the Trust Account, the Bar charges that the Respondent violated the following ERs and Rules:

1. ER 1.15, Rule 42, Ariz.R.Sup.Ct.; failure to safeguard client's property;
2. Rule 43(a), Ariz.R.Sup.Ct.; failure to maintain and preserve complete trust account records; and records of the handling, maintenance and disposition of clients funds coming into his possession;
3. Rule 43(a) and 43(d)(1)(E), Ariz.R.Sup.Ct.; failure to maintain complete and adequate records for a period of five (5) years after final disposition of the client funds;
4. Rule 43(d)(1)(A), Ariz.R.Sup.Ct.; through failure to exercise professional care in the performance of his duties relating to his trust account when he overdrew his trust account;
5. Rule 43(d)(1)(C), Ariz.R.Sup.Ct.; through failure to maintain internal

controls adequate to safeguard funds held in trust by overdrawing the trust account; and

6. Rule 43(d)(1)(D), Ariz.R.Sup.Ct.; through failure to promptly and completely record all transactions regarding his trust account.

With respect to the conduct of the Respondent following the initiation of the investigation, the State Bar charges the Respondent with violation of the following ERs and Rules:

7. ER 8.1(b), Rule 42, Ariz.R.Sup.Ct.; failure to respond to a lawful demand for information from the State Bar in a timely fashion; and

8. Rule 53(d), Ariz.R.Sup.Ct.; through failure to cooperate with officials and staff of the State Bar.

Conclusions of Law

The allegation of a violation of ER1.15, Rule 42, Ariz.R.Sup.Ct.; [¶ 1, *supra*] is not sustained. The violation would only have occurred if Respondent had not actually earned the amount transferred from the trust account to his own funds. He testified that all sums so transferred were actually earned, and that his only failure was to maintain records showing the amount earned. This lapse is covered by other violations charged. The State Bar has not met its burden of proof for this allegation.

The allegation of a violation of Rule 43(a) and 43(d)(1)(E) [¶ 3, *supra*] for failure to maintain proper records “for a period of five (5) years after the final disposition of the client funds” is not sustained as premature. The evidence showed that the client

representation did not end until some time in 2008. The State Bar has not met its burden of proof for this allegation.

Further, it does **not** appear that requests for continuances made to State Bar staff, especially where such requests were apparently readily granted, amounts to a violation of Rule 53(d), Ariz.R.Sup.Ct. Nor does it appear anywhere in the evidence that Respondent failed to provide complete information. He may have been slow, but no "failure" was proved by clear and convincing evidence.

The remaining allegations are sustained by the evidence. The Respondent virtually admitted, and there is no doubt that he failed to maintain adequate trust account records, including records of the handling, maintenance and disposition of client's funds; in violation of Rule 43(a), Ariz.R.Sup.Ct.

There is further a virtual admission, and no doubt that his overdrawing the trust account and failure to promptly correct and record trust account transaction violated Rules 43(d)(1)(A), 43(d)(1)(C) and 43(d)(1)(D), Ariz.R.Sup.Ct.

The evidence also establishes by clear and convincing evidence that Respondent's response to a demand for information from the State Bar was, on several occasions, not timely, in violation of ER 8.1(b), Rule 42, Ariz.R.Sup.Ct.

ABA Standards Applicable

The Supreme Court has consistently held that the American Bar Association Standards for Imposing Lawyer Sanctions should serve as guidelines, along with a consideration of the proportionality of the selected sanctions.

Standard 4.1; Failure to Preserve the Client's Property is arguably applicable due to the extremely poor trust account record keeping and handling practiced by Respondent. Standard 4.14 states that "admonition" [Informal Reprimand under the Arizona Rules] is appropriate where the dealing "causes little or no actual or potential injury to a client". That is clearly the case here.

The continual delays in providing information to State Bar staff is urged by the State Bar as a factor under Standard 6.2; Abuse of the Legal Process. Again, admonition is appropriate where there is an "isolated instance" which "causes little or no actual or potential injury to a party or causes little or no actual or potential interference with a legal proceeding".

Mitigation and Aggravation

The State Bar suggested two factors in aggravation. The first was factor 9.22(d); multiple offenses. There were actually two offenses, the first being the failure to keep proper trust account records and the second, causing the overdraft. But in another sense, this was virtually all one transaction with one client; so while this factor exists technically, it is somewhat limited in its application. The second suggested factor is 9.22(i); substantial experience in the practice of law. Again, while the years spent in practice by Respondent would meet this test; the actual time spent in private practice compared with his virtually exclusive practice as a "public" lawyer, with no trust account experience or obligation, also limits the applicability of this factor.

1 The Bar also recognized a number of mitigating factors. These include 9.32(a),
2 absence of a prior disciplinary record; 9.32(b), absence of a dishonest or selfish
3 motive; 9.32(c), personal or emotional problems (personal and family health);
4 9.32(d), timely effort to rectify the consequences of the misconduct; and 9.32.(l),
5 remorse. All were clearly sustained by the evidence.

6 **Proportionality**

7 While similar cases should be considered, each case must stand on its own facts.
8 The Bar suggests two cases involving single instances of trust account errors which
9 resulted in censure, and which the Bar considered particularly appropriate . These
10 are, *In re Tacker*; SB-07-0057 and *In re Lee*; SB-06-0001-D. In both cases there
11 were also failures and delays in responding to the Bar and providing information,
12 particularly in the *Lee* case.
13

14 Respondent offered two cases as pertinent. *In re Rocco*; SB-03-0109 involved
15 money missing from the client's trust fund over a three year period, an inability to
16 explain various fund transfers, lack of cooperation, failure to produce records and
17 lack of communication with the client. Despite this, a recommendation for informal
18 reprimand was sustained over the Bar's objection. The second case was *In re Ball*.
19 SB-05-0597 in which there was a similar small overdraft, as well as a failure to keep
20 adequate records. An informal reprimand was affirmed.
21

22 **Conclusion and Recommendation**

23 It is black letter law in Arizona that the purpose of discipline is not to punish the
24


attorney, but to protect the public. While Respondent's record keeping and accounting practices were lax, the testimony indicated that his sole client, receiving the benefit of a very low rate for legal services, was never injured by the acts of Respondent. The overdraft error was corrected quickly. Some of the reporting delay arose from the incorrect address placed on the account by the bank. While Respondent was not prompt in his replies to the Bar, he did maintain regular contact. The State Bar staff, more than willing to extend Respondent's time to respond, evidently was arguably not even inconvenienced, much less harmed in its ability to do its job by the delays.

Unlike the situation in the cases cited for proportionality, Respondent herein was and is not engaged in private practice, and had little if any experience with trust accounts or the accounting rigors involved. He had a very heavy case load in his public service practice on behalf of indigent Native Americans, as well as health problems both personal and involving his wife and sister. That he did not assign the highest time priority to a matter which had been corrected, and which injured no one, is not surprising. The State Bar did not appear to assign it a very high priority either. The very activity which led to this problem is itself extremely unlikely to occur again. Nor is any similar laxity on the part of Respondent to be expected if he ever engages in private practice in the future. The public is at the least risk possible.

In is therefore recommended that the sanction in this case be an Informal Reprimand
issued to Respondent David E. Oliver.

While this recommendation would ordinarily be accompanied by a recommendation
for probation based on completing the Bar's Trust Accounting (TAP) program; the
evidence here showed that Respondent has already done that, so that a probation
period does not appear to be necessary.

Respectfully submitted this 4th day of December, 2008.


Philip M. Haggerty
Hearing Officer 6K

Original filed this 5th day
of December 2008

and copies mailed to:

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